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No. 84-318

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER 1984 TERM

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DAVID CASTAÑÓN PÉREZ, *et al.* and AMERICAN INTERNATIONAL INSURANCE COMPANY OF PUERTO RICO,

*Petitioners-Appellants*

*v.*

ABBOT BUDD KAUFER MEDINA, *et al.*,

*Respondents-Appellees.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF OF RESPONDENTS IN OPPOSITION

EDELMIRO SALAS GARCIA
*Attorney for Respondents*
58 Caribe Street, Condado
Santurce, Puerto Rico 00907
(809) 722-8722

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ABBOT BUDD KAUFER MEDINA, *et al.*,

*Respondents-Appellees.*

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## BRIEF OF RESPONDENTS IN OPPOSITION

---

This brief is submitted by respondents Abbot Kaufer Medina *et al.*, (Medina) in opposition to the petition of the American Insurance Company (American Insurance) and David Castañón Pérez (Pérez) for a writ of certiorari to the United States Court of Appeals for the First Circuit.

### Statement of the Case

This action involves an attempt by the owner-operator of an 18-foot pleasure boat, the insurance company with coverage of the watercraft, and by the boat itself, principally to avoid punitive damages available only in Puerto Rico in admiralty, for the grossly reckless navigation of the boat by the owner, at high speed, on navigable waters of the Atlantic Ocean, which produced a collision with two persons in such waters, utterly chopping up one of them with the boat's propeller with ensuing extensive mutilation and permanent loss of one arm. The operator and the boat then fleeing the scene of

the accident without giving any aid to the helpless respondents who were left to drown claiming that such "navigation" or occurrence did not qualify within the term "traditional maritime activity," thus, that admiralty jurisdiction was lacking.

As recognized by the Court of Appeals for the First Circuit, this is a case for classic application of long established admiralty principles developed by this Court: a) a vessel in navigable waters is liable for injuries that it causes thereat through its navigation; b) the owner-operator of the vessel is likewise liable for the injuries that it causes in its reckless navigation of such vessel; c) the vessel's nature, coupled with such reckless conduct in navigable waters are all that is required to give rise to admiralty jurisdiction; d) the vessel's reckless navigation at high speed conducted in such manner in navigable waters of the Atlantic Ocean in an area where such owner-operator knows or should have known is also used by people swimming in such waters, makes both liable for the ensuing damages; e) and a marine insurance contract covering the operation of such watercraft confers likewise admiralty jurisdiction and is the reason for the insurance company's presence in this case; and f) there is no requirement that there be a *collision* between two boats to establish "traditional maritime activity" for admiralty jurisdiction.

To have failed to give effect to all these principles would have been repugnant to this Court's established legal precedent.

## Facts

This action seeks recovery in admiralty against the boat itself (R28).* It also seeks to have the owner-operator Pérez assessed for the liability he incurred in

*Numbers in parentheses prefixed by the letter "R" refer to their docket number in the District Court.

ramming down two helpless persons in the water and after such collision, running away from the scene of such misdeed without giving any assistance to the persons left to drown.

The insurer covering the libeled boat's operation is co-petitioner American Insurance. Against the insurance company the respondents also seek damages in its bad faith litigation, having failed to honor its commitment to third-party beneficiary Medina, on its marine coverage for the actor boat. The said insurance company is still claiming lack of jurisdiction in admiralty, in this Court, after having delivered to the Superior Court of Puerto Rico what it claims is the face amount of the policy, the sum of $100,000. Such efforts on the part of American insurance are just directed to defeating the claim for punitive damages available only in the federal court's admiralty jurisdiction. Medina was maimed for life with the libeled boat on August 8, 1982. The deposit of $100,000 in the Superior Court of Puerto Rico was announced to the District Court on October 13, 1982, only after Perez had presented expert testimony, which brought his acquittal on "reasonable doubt" in the criminal action conducted by the government of Puerto Rico. Pérez's previous acquittal caused the Supreme Court of Puerto Rico to decide that his navigation of the libeled boat entailed the necessary intent for the crime of mayhem. *Pueblo v. Pérez*, _____ P.R.R. _____, 83 J.T.S. 81 (1983). That decision is annexed hereto as appendix of respondents.

After the announcement of American Insurance of the delivery of $100,000 to the Superior Court, the District Court below *sua sponte* reversed its previous denial of lack of jurisdiction and dismissed the case, 575 F. Supp. 168 (D.C.P.R.). It had previously denied the motion of Perez for dismissal on lack of jurisdiction back on April 25, 1983 (R14). Thus, on November 15, 1983, the District Court then dismissed this case for lack of jurisdiction

against the owner-operator of the boat, against the boat, and against the marine insurance company. It supported its decision on a pre-*Foremost* Circuit Court case, *Crosson v. Vance*, 484 F.2d 840 (4th Cir. 1973). It found that since only one boat was involved no admiralty jurisdiction existed, and stated:

> Had this been a case involving the collision of two boats we would have been compelled to apply *Foremost* and exercise jurisdiction . . . . We refuse to exercise jurisdiction over a tort involving an injured swimmer.

The First Circuit Court of Appeals found this case not to be one dealing with an injured swimmer but one dealing with the operation of a boat on navigable waters. It rejected the District Court's adherence to the dissenter's position in *Richardson v. Foremost Insurance Co.*, 457 U.S. 668 (1982) which was decided by this Court a scant 45 days prior to the running down of respondents with the boat libeled in this case.*

The Court of Appeals applied the decision of *Foremost, supra*, because here there was a boat involved and there existed no requirement that the vessel be commercial in order to establish admiralty jurisdiction. The Court of Appeals further stated that the libeled boat in

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*Lack of knowledge of *Foremost*, (it being thought at the time that pleasure craft were not encompassed under the admiralty jurisdiction of federal courts) brought about the filing by respondents of a civil case in the local court. When respondents learned of the *Foremost* decision, they promptly filed the instant admiralty action against the boat, the owner-operator, and the insurance company on the marine contract covering the operation of the watercraft because of the exclusive jurisdiction subject matter and because the actor boat operator-owner had been engaged in the most traditional maritime activity of all, navigation of a boat in the navigable waters of the Atlantic Ocean, however outrageous that navigation.

this case "was a vessel, and that is enough" and that there was claimed wrongful navigation of such vessel. The Court of Appeals rejected the District Court's requirement of *two* boats having to be involved and reiterated that the focus of *Foremost* was whether the wrong was related to "traditional maritime activity" and that this Court "had made clear that the most fundamental of such activities is navigation of a vessel."

Accordingly, the Court of Appeals reversed the dismissal of the action against the boat, the owner-operator and the insurance company on the marine contract.

**A. The petition for a writ of certiorari should be denied because the United States Court of Appeals correctly applied the decisions of this Court.**

Petitioners have failed to put forth a single cogent reason why a writ of certiorari should be issued. The two boats involved in *Foremost, supra*, were wholly lacking in any commercialism. Their nature was pleasure. The thrust of this decision, with such two small outboard-powered boats could not leave doubt in anyone's mind that there is no commercial requirement as a pre-requisite to admiralty jurisdiction. In the event that someone wished to doubt, this Court made sure no such misunderstanding could be claimed. The express ruling was:

> We also agree that there is no requirement that "the maritime activity be an exclusively commercial one."
>
> * * *
>
> The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully indicated

> only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. (Emphasis of this Court).
>
> * * *
>
> Moreover, the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities.

An analysis of petitioners' theories shows that they must fail since the petition clearly characterizes the Circuit Court's decision as lacking admiralty jurisdiction solely because of there being swimmers in the navigable waters, when in fact the Circuit Court, relying on *Foremost*, properly concluded that admiralty jurisdiction existed since the negligent operation of a vessel on navigable waters was what had caused the injuries. In short, whether the status of the victim of the negligence be a swimmer, a fisherman or passenger on another vessel, is quite irrelevant as opposed to that of the actor. See: *Gemp v. United States*, 684 F.2d 404 (6th Cir. 1982) and *Clark v. Mobil Oil Corp.*, 693 F.2d 500 (5th Cir. 1982). In *Clark*, *id.*, there was not even a collision but the wake of the actor tugboat was the cause of the injuries.

Thus, this Court's declared uniformity of rules of conduct was rejected by the District Court below in its adoption of an additional requirement, that a *second boat* must be involved to establish admiralty jurisdiction. Petitioners' efforts to avoid punitive damages make them confuse subject matter jurisdiction with the personal status of the injured respondents, as though review should be made of their citizenship, a $10,000 minimum requirement, etc., or that they should pass some sort of eligibility requirement.

Petitioners' position is that only one boat's navigation is insufficient; if there are two boats, then there is

jurisdiction. Pursuant to such theory, a boat and its owner-operator in navigable waters would be outside the exclusive admiralty jurisdiction of a federal court unless the injured party, as a result of such navigation, is riding on another boat. This is erroneous because it should not be what participation in the collision plays the victim. Instead, the controlling fact should be that of the vessel and owner-operator that caused the injury for which the claim is brought in admiralty under the uniform duties and liabilities declared in *Foremost, supra*. In the case at bar the injuries were caused solely by *one* boat, and it was not necessary that the navigation of another vessel be disrupted or collided with. Jurisdiction in admiralty is the power to adjudge facts concerning the operation of a vessel in navigable waters which is a general question not dependent on a particular set of facts or on the personal status of the *injured* party, be it a person in the water, a fisherman on another boat, a passenger on the same vessel or the owner of a house boat. To put it another way, it is the power to hear and determine causes of the class in which the particular controversy belongs. We understand that to be precisely the main thrust of *Foremost, supra*, as the answer to the need for uniform rules governing navigation of vessels over the millions of boats in operation in the United States, including Puerto Rico. These rules are for navigation of vessels and not for swimmers and it is clear that the locality-plus requirements of *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) are met in that here there is a watercraft involved instead of birds and an airplane, and that the most traditional maritime activity there is, is that of navigating in the Atlantic Ocean 120 feet from the shore.* Thus, the teachings of *Executive Jet*, and

*The area in which respondent Medina was swimming was at least 120 feet from shore. 575 F. Supp. at 169. Not only did pleasure craft, sail and power, frequent the area

*(footnote continued on the following page)*

*Foremost* have been fully followed and the decision of the Court of Appeals is correct in its analysis and application. Petitioners' contrary advancement of a rule of "significant relationship with maritime commerce" (Petition, p. 9) is misplaced as is the new proposed special "locality" requirement in such a theory when they state:

> We understand that there may be a significant relationship with maritime commerce when two boats collide at the mouth of a port, but not when a pleasure boat strikes a swimmer a few feet from the shore. (Petition, p. 9).

Thus, in addition to a *two* boat proposed requirement, petitioners also advance another requirement, that the collision take place not only in navigable waters but at the mouth of a port or similar place. Petitioners then contend that the Court of Appeals decision allows admiralty jurisdiction whenever a pleasure boat is involved. Not so. A reading of the decision of the Court of Appeals leaves no doubt that such jurisdiction in admiralty will be allowed only if there is a traditional maritime nexus, which the Court correctly found to be the *navigation of a vessel* and stated:

> The focus of *Foremost* was whether the wrong was related to "traditional maritime activity", and the Court made clear that the most fundamental of such activities is navigation of a vessel.

That there is no requirement of *two* boats is clear from this Court's statement in *Foremost:*

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*(footnote continued from the preceding page)*
(which was not marked by buoys or otherwise restricted either for swimming or boating) but there is a shipyard nearby (App. p.14). In this case, after running over respondents, evidence showed that the operator of the boat first kept looking back on the scene of the damage and then sped away even faster in a different direction (App. p.15).

> Because the "wrong" here involves the negligent operation of *a vessel* on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court. (Emphasis added).

The Court of Appeals repeated almost *verbatim:*

> The wrong alleged here was negligent navigation.

The facts herein thus meet the necessary criteria for application of the *Foremost* principles as was held by the Circuit Court.

**B. There are no conflicting decisions between the federal courts.**

Contrary to petitioners' contentions (Petition at 12), there are no contradictory opinions existing to this day regarding pleasure boating collisions and federal admiralty jurisdiction. Prior to *Foremost,* there were such decisions but the Court of Appeals clearly addresses that fact by stating:

> These decisions, both of which preceded *Foremost,* . . . . (Petition 12a)

Indeed, the Court of Appeals went further. It said:

> Even if this distinction were reasonable after *Executive Jet,* we do not believe it survived *Foremost.* The focus of *Foremost* was whether the wrong was related to "traditional maritime activity," and the Court made clear that the most fundamental of such activities is navigation of a vessel. The wrong alleged here was negligent navigation.

As noted above, after *Foremost,* there are no inconsistent decisions cited by the petitioners contrary to the decision of the Court of Appeals. The pre-*Foremost*

decisions of *Crosson v. Vance*, 484 F.2d 840 (4th Cir., 1973) and *Richards v. Blake Builders Supply, Inc.*, 528 F.2d 745 (4th Cir., 1975) aside from being pre-*Foremost*, did not involve a libel against the vessel or against the marine insurance covering such vessel. Moreover, in *Gemp*, a post-*Foremost* case, there was only *one* pleasure boat involved and the Court expressly stated that admiralty jurisdiction existed under *Foremost*. Additionally, it should be noted that there has not occurred any congestion of the federal docket on account of the *Foremost* decision. To the contrary, there appears uniformity in the very few reported decisions.

**C. There is no important federal question that has not been settled.**

Petitioners contend that:

> Since *Executive Jet* criticized jurisdiction in injured swimmer cases, but *Foremost* spoke about the negligent operation of a vessel on navigable waters, courts everywhere have no clear guidance from this Court in deciding to grant or deny jurisdiction in an injured swimmer situation. (Petition, p. 19).

As noted above, in *Executive Jet*, *supra*, the locality-only rule was increased with the requirement that there be a traditional maritime nexus and there being only birds and an airplane involved in *Executive Jet*, it was found that there was no admiralty jurisdiction. Then the commercial requirement was eliminated in *Foremost*, *supra*, and now pleasure boats operating in navigable waters come under uniform rules of navigation. There is thus complete and clear guidance in all cases where there are boats navigating. The case at bar is not about two swimmers injured on a beach or by a submerged object or by another swimmer. It is about the reckless speeding of one boat that ran over two persons in

navigable waters, all of which under coverage of a contract of marine insurance which is the reason why petitioner American Insurance is in the case at bar. After the impact, the owner-operator and the libeled boat, which is a party *in rem* in this case (Petition, p. 23, 24), left respondents to drown and one of them, Medina, a pre-med student, lost an arm. Punitive damages are sought in the District Court, *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (1981), where such damages are available only in admiralty since Puerto Rico has no such remedy. *Carrasquillo v. Lippitt & Simonpietri, Inc.*, 98 P.R.R. 646 (1970).

It is also the position of respondents that a claim on a marine insurance policy falls within the admiralty jurisdiction of a federal court even if such coverage is provided under a policy entitled "Homeowner's." The injuries complained of resulted from callous disregard of rules of proper navigation, and there is no controversy in that the boat is covered by said policy. *Fleming v. Pan American Fire & Cas. Co.*, 495 F.2d 535 (5th Cir., 1974); *Ed & Fred, Inc. v. Puritan Mar. Ins. U. Corp.*, 506 F.2d 757 (5th Cir., 1975); *Stanley T. Scott & Co., Inc. v. Makah Development Corp.*, 496 F.2d 525 (9th Cir., 1974); *Owens-Illinois, Inc. v. United States Dist. Court*, 698 F.2d 967 (9th Cir. 1983); *American President Lines v. Green Transfer & Stor.*, 568 F. Supp. 58 (1983); *Insurance Co. of North America v. Virgilio*, 574 F.Supp. 48 (1983).

The most maritime object is a vessel. It is that vessel's reckless navigation which is the basis not only for the claims of the injured respondents but also for the admiralty jurisdiction of the federal court.

## CONCLUSION

**Petitioners are unable to demonstrate any inconsistency between the decisions of the Court of Appeals and any decision of a federal court after the *Foremost* decision. As a result, review by this Court is unnecessary, and the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be denied.**

Dated: November 26, 1984

Respectfully submitted,

EDELMIRO SALAS GARCIA
*Attorney for Respondents*
58 Caribe Street, Condado
Santurce, Puerto Rico 00907
(809) 722-8722

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico,

Plaintiff and petitioner

v.

David Castañón Pérez,

Defendant and respondent

No. 0-82-793
Certiorari

MR. JUSTICE DIAZ CRUZ delivered the opinion of the Court.

San Juan, Puerto Rico, June 30, 1983

The Government seeks review, by way of certiorari, from a peremptory acquittal decreed by the trial court in a mayhem charge, which acquittal was grounded on findings of fact that, insofar as pertinent[1] for our decision, state:

> On Sunday, August 8, 1982, between four thirty and five o'clock in the afternoon, the young man Abbot Kaufer Medina, together with his cousin Luis Rafael Vélez Medina and his friend Sergio Cima de Villa, were enjoying a day at the beach.

[1] We have only omitted one paragraph and part of another (15 lines).

They were in the water, about 120 to 125 feet from the shore. By shore here is meant the water's edge. It was a sunny day, the sea was calm and normal in the beach sector of Isla Verde, jurisdiction of Carolina, known to water sports lovers as "Los Hobbie," because there is a hobbie cat shipyard nearby, between the Villas del Mar and Girasol Condominiums. A short while after they had gone into the water, and while they were chatting at about ten (10) feet from one another, Sergio Cima de Villa, looking east and his friends Abbot and Luis facing him with their backs to the east, saw a speeding motor boat approaching them; the boat travelled from east to west about thirty (30) or forty (40) feet away. He called out to Luis, "careful, a motor boat is coming," Luis looked back, and immediately dived. The boat went between him and his friends Abbot and Luis, who were at the above-mentioned distance from him.

That he heard the noise of something that was hit, that the motor boat passed at about six (6) feet from him, that he did not have the time to swim. He did not dive, or suffer any impact of injury from the motor boat. That, after this incident, he asked his friend Luis if he was all right and he answered yes, he asked Abbot, are you okay? Is anything wrong with you? Abbot did not reply. When they saw that Abbot did not answer, they swam towards him, and noticed that there was blood around Abbot's body, that his body was sinking.

That with the help of Luis Rafael Vélez Medina and other swimmers that went to the scene, they got Abbot to the

shore and, once on the sand, he realized that Abbot's left arm was missing, and that he was injured on the left side of the body, and was bleeding profusely. Abbot was taken to a hospital in a taxi they hailed.

That there were many people on the beach and in the water, although he did not mention a specific place; he merely indicated that the group of swimmers nearest to them was at about twenty-five (25) feet. (Regarding this point, that is, the group of swimmers, another witness, Luis Rafael Medina, said the swimmers were at about forty feet from them.)

According to the evidence for the prosecution, witness Luis Rafael Vélez Medina, who could not identify the defendant as the pilot of the motor boat that afternoon of August 8, 1982, reckons that the motor boat was traveling at a speed of fifty (50) to fifty-five (55) miles per hour, comparing it to an automobile. That after the motor boat hit them, it did not stop to help them; that it kept its course towards San Juan, making a left turn and heading eastward, that is to say, towards Boca de Cangrejos. According to the evidence for the prosecution, the depth of the water at the scene of the accident was six (6) feet or a little over six (6) feet. Evidence was also brought in the sense that, while moving away from the scene of the accident, the pilot of the motor boat kept looking back, that there was nobody else with him, that when he stopped looking back, he put on speed heading towards Boca de Cangrejos, where later on the motorboat was found. It was described as a gray 18 to 20-foot Glastron motor

boat; the defendant was spraying the back (stern) of the boat with a hose. The boat was already out of the water, . . . .

Orestes Pavía and Sergio Cima de Villa, witnesses for the prosecution, identified the defendant David Castañón Perez, in open court as the boat pilot at the time of the accident, who did not stop to assist the injured or to furnish his personal information to the affected party or parties.

Likewise, the prosecution brought evidence to the effect that the defendant also failed to notify the accident to the Ports Authority, as was his duty under the Law (stipulated testimony of Mr. Ricardo Correa Marcano, an officer of the Ports Authority).

The offense of mayhem is defined thus in art. 96 of the 1974 Penal Code, 33 L.P.R.A. § 4033:

Every person who unlawfully and maliciously deprives another of a member of his body, or maims, disfigures or renders him useless, or cuts or mutilates the tongue, or puts out an eye, or slits the nose, ear or lip, disfigures or permanently changes the appearance of his face, or permanently impairs his capacity to hear, see or speak, shall be punished by imprisonment for a fixed term of nine (9) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of fifteen (15) years; if there should be extenuating circumstances, it

> may be reduced to a minimum of six (6) years. The Court may impose the penalty of restitution in addition to the penalty of imprisonment established, or both penalties.

The definition of the terms "malice" and "maliciously" given in art. 7(19) of the Penal Code, 33 L.P.R.A. § 3022(19), stating that they "denote the commission of a damaging, intentional act, without justification or excuse and the conscious nature thereof," must be read and understood under the culpability standards laid down in art. 14, which provides:

> No person may be penalized for an act or omission regarded to be a crime pursuant to law unless the same is done with intent or criminal negligence.
>
> The intent or negligence are shown by the circumstances connected with the crime, the mental capacity and the expressions and conduct of the person. 33 L.P.R.A. § 3061.

The new provision introduces the classification of the offense as either intentional or willful; and negligent or culpable, equivalent to reckless negligence. Absence

of malice constitutes the main key to characterize negligence. Our Code then proceeds to distinguish between intent and negligence, and states:

> Art. 15. Intent
>
> Crime is intentional:
>
> (a) When the result has been foreseen and wanted by the person as a consequence of his act or omission; or
>
> (b) When the result, though unwanted, has been foreseen or could have been foreseen by the person as a natural or probable consequence of his act or omission. 33 L.P.R.A. § 3062.
>
> Art. 16. Negligence
>
> The person who brings about an unwanted criminal result through negligence or carelessness, or lack of circumspection or skill or through nonobservance of the law, is responsible for negligence. 33 L.P.R.A. § 3063.

The fact that intent and means have not been qualified in mayhem--as in murder (arts. 82 and 83 of the Penal Code)--does not allow for the requirement of specific intent. Many years ago, and without the help of such an explicit means as that pro-

vided by the modern Penal Code, this Court reached the same conclusion when it held that "it is not necessary under the code to prove a specific intention in order that mayhem may be held to have been committed, inasmuch as every person must answer for the natural consequences of his willful and malicious acts, it is not necessary that the information alleges such intention to commit mayhem." And at the end, the opinion anticipated the above-mentioned forms of intent and negligence, and we stated: "what the fiscal must prove in cases of this kind (a wound that severed four fingers) is that the accused deprived another person of a member of his body." People v. Pizarro, 21 P.R.R. 17, 20, 22 (1914).[2]

[2]The text thus construed in 1914, was art. 212 of the 1902 Penal Code, which, insofar as its introductory part is concerned: "Every person who unlawfully and maliciously deprives a human being of a member of his body. . .," coincides with the present art. 96.

The acknowledgment of extenuating circumstances--known as causes excluding liability--complements the concept of criminal liability in the Code. Fortuitous event, which is the first one on the list and which is the only one that may be related (although not applied) to the case at bar, is identified thus in art. 18 of the Code: "A person who, upon executing a lawful act, with due diligence, or upon committing an omission, causes injury by mere accident, misfortune, or fortuitous event, without intention or negligence, shall not be held liable."

On January 20, 1983, we ordered the defendant-respondent to show cause[3] why we should not accept, as prima facie evidence of the offense of mayhem, under the rules of intent and negligence of arts. 15 and 16 of the Penal Code, the evidence presented up to this moment at the trial and on which evidence the trial court granted a peremptory acquittal. Confronted with the precise

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[3]The order reads thus:

"Bearing in mind that the evidence brought up to this moment to the trial by The People of Puerto Rico establishes that the defendent incurred negligence that (a) brought about an unwanted criminal result through carelessness, or lack of circumspection or skill, or through nonobservance of the law (art. 16 Penal Code, 33 L.P.R.A. § 3063; 23 L.P.R.A. § 451h(a)); or (b)committed a criminal act in circumstances where the result, though unwanted, has been foreseen or could have been foreseen by him as a natural or probable consequence of his act or omission (art. 15, Penal Code, 33 L.P.R.A. § 3062); and that the offense of mayhem does not require more intent than the manifested by the aforesaid conduct, the respondent shall have until February 4, 1983, to show cause why we should not find prima facie evidence of mayhem, set aside the nonsuit resolution, and remand the case for further trial."

and all-embracing text of said criminal provisions, the defendant-respondent could only offer a solution that falls within the realm of the Legislative Assembly: that the offense of mayhem be limited, insofar as intent is concerned, to assault or intent to assault and to cause injury, and that malice be presumed only if the damage was a consequence of an act dangerous per se. The proposition is so ambitious that it calls for the modification of the basic liability principle that characterizes the Code as an instrument of social protection in the modern times, times of high industrial development; it limits such concepts as intended and negligent crime, and shuns in the offense of mayhem, the essential purpose of punishing atrocity,[4] disregarding the means

[4]The offense of mayhem was originally considered an atrocious breach of the king's peace, an offense tending to deprive him of the aid and assistance of his subjects rendering them less able in fighting either to defend themselves, or annoy their adversaries. State v. Bass, 255 N.C. 42 (1961); 86 A.L.R.

or the instrument used for its commission. Regarding the criminal negligence or culpable act set up in art. 16 based on a person's bringing about an unwanted criminal result through negligence, carelessness, lack of circumspection or skill, or nonobservance of the law, the need of making it punishable only when required by ulterior specification of the Code or by a special law, was rejected after extensive debate.[5] The modern

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2d 259. Nowadays what is protected is the integrity of the person, the natural sufficiency and good appearance of the limbs and organs of the human body, and the preservation of its functions.

[5]Comments to art. 16 in the Justice Department edition, 36 Rev. Col. Abo. 22, No. 1 (February 1975), that presents the statement of criminalist López Rey & Arrojo, which reads: "the general tendency is to recognize a greater criminal liability for facts arising from negligence, lack of skill or nonobservance of the duties, based on the complexities of the modern world evinced in the evergrowing mechanization, industrialization, fabrication and prefabrication, mass production, growing technology and a need for greater expertise, all of which means that a greater attention and care should be paid to the community. There were no such demands and circumstances in the mid-nineteenth century."

structure of our Criminal Law, elaborated over the principle that the person who commits a criminal act is liable for all the damages arising therefrom,[6] establishes that the absence of a perfect balance between the criminal intent and the result in no way excludes the criminal liability of the agent who will be reached both by the liability derived from the act committed and the liability for the consequences arising therefrom.

Article 15(b) of the Code establishes that the crime is intentional when the result, although unwanted, was foreseen or could have been foreseen by the person as a natural or probable consequence of his act or omission. The conjugation of intent and consequence restricts the connotation of malice that, within the meaning of the term in art. 7(19) of the Code, does not

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[6] Cf. Pueblo v. Calderón Laureano, 82 J.T.S. 156.

go beyond a damaging, intentional act, without justification or excuse, the awareness of whose nature is present in the person who commits it. Conclusion which we had already reached in People v. Pizarro, supra, where we deemed that the information did not have to allege "intent to commit mayhem." In California,[7] from where our original article was taken, the term "maliciously" in the definition of mayhem does not imply determination and premeditation, and it is sufficient to prove only the commission of an act from which the law will presume that it was done unlawfully and maliciously, unless the evidence tends to show an extenuating circumstance. People v. Nunes, 190 P. 486 (1920); 47 C.A. 346, 349. The only intent required is that which could be inferred from the injuries resulting from

[7]The California Code defines mayhem thus: "Every person who unlawfully and maliciously deprives a human being of a member of his body. . . ." Sec. 203, West's Annotated California Codes, Penal, Secs. 1-210.

certain intentional acts. Goodman v. Superior Court of Alameda County, 148 Cal. Rptr. 799 (1978); 84 Cal. App. 3d 621. Based on the premise that the intentional unlawful conduct comprises malice, the Supreme Court of North Carolina affirmed a sentence for mayhem imposed on a physician who, in the absence of the actual offender, deadened the fingers whose severance the victim had arranged with a third person in order to collect insurance money. State v. Bass, 120 S.E.2d 580 (1961), n. 4, ante.

Deliberate malice is not an essential element of the offense of mayhem, hence proof of premeditation or deliberation is not necessary. People v. Wright, 93 Cal. 564, 566 (1892). In People v. Cordero, 82 P.R.R. 367, 370 (1961), we approvingly cited People v. Wright and People v. Pizarro, supra, in the sense that the offense of mayhem does not require proof of specific intent or premeditation because, "in any

event, said malice may be inferred from the conduct of the accused or the circumstances attending commission of the offense . . . ., since malice is, for this purpose, a synonym of the purpose or design to injure . . . . (M)alice shall be established by proof of the commission of the act. . . . One of the aims of the lawmaker in defining this offense was to avoid astounding brutality . . . and hence that malice could be presumed from the atrocity of the act itself and which, among other cases, is inferred from the nature of the instrument or means used for the assault." The United States Supreme Court probed into this field of liability that includes purpose, knowledge, inprudence, and negligence, and concluded that, insofar as the administration of the federal system of criminal justice is confided to ordinary mortals, whether they be lawyers, judges, or jurors, the system could easily fall of its own weight if courts or scholars became

obsessed with hair-splitting distinctions, either traditional or novel, that Congress (please read Legislature) neither stated nor implied when it made the conduct criminal. United States v. Bailey, 444 U.S. 394, 406 (1980). Cuello Calón also opines that the words "maliciously," "knowingly" and "purposely," and others that denote the willfulness of the agent, constitute "completely superfluous redundancies" and that said expressions have been used to denote a merely intentional act (with that common or ordinary intent). I-1 Derecho Penal 430 (16th ed. 1971).

The evidence for the prosecution in the case at bar shows that the respondent was piloting a motorboat at high speed on a crowded beach, in a shallow (six-feet deep) bathing area. After the impact of the motorboat and swimmer that severed Kaufer Medina's left arm, the prima facie concept of the intentional offense of mayhem defined in

art. 15(b) of the Penal Code comes forth:

a result that, although unwanted, could have been foreseen by the respondent pilot as a natural consequence of his act. The foreseeability of causing serious injury to the swimmer, induced by the awareness of the risk entailed by traveling at 50 mph in a 6 feet deep area crowded with people, should also be in our milieu a constant concern of motorboat sportsmen in view of the frequent public protests made by swimmers against the incursion of boaters into shallow bathing areas. The form in which the respondent was piloting his motorboat, and the place as per the trier's findings, not only constituted a ground to establish the foreseeability of the catastrophic accident, but also a highly dangerous and notorious conduct, strongly condemned in our public beaches. The rule laid down in People v. Astacio, 23 P.R.R. 783 (1916), that required a cyclist who was speeding through

the streets of Cabo Rojo to foresee that he could run over somebody as he actually ran over a girl--and was convicted for assault and battery--is more effective today, more than half century later. The defendant-respondent, who was not riding his bicycle through the usually deserted small-town street, but who was speeding in his motorboat amid the heads and torsos of bathers clustered in a crowded beach, creates a dangerous situation and "cannot be heard to deny that he intended to cause bodily injury to any of them, although he may not have intended to injure a particular person." Astacio, supra at 786. "The duty to pay attention and to exercise due diligence . . . demandable from all persons in the course of daily life seems to be more urgent as time goes by, due to modern life conditions where man has access to a tremendous array of mechanical forces whose imprudent or negligent operation could

cause very serious wrongs, thus the violation of said duty calls for strong sanction." Cuello Calón, op. cit. at 448.

We appreciate the intellectual honesty of the trial judge who was led to an erroneous conclusion in this sad case, which he worked without the benefit of the construction offered today by this Court on a question that has required an in-depth examination for which we know he had no time or means within the constant pressure of the criminal calendar.

In view of the foregoing, the writ is issued, the peremptory acquittal from the charge of mayhem is set aside, and the case shall be remanded for further proceedings consistent with our result herein.

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico,

Plaintiff and petitioner

v.

David Castañón Pérez,

Defendant and respondent

No. 0-82-793
Certiorari

Separate vote of MR. JUSTICE DAVILA.

San Juan, Puerto Rico, June 30, 1983

I have joined the opinion of the Court, but I think it necessary to state that, even under respondent's theory that "the offense of mayhem be limited insofar as intent is concerned, to assault or intent to assault and to cause injury, and that malice be presumed only if the damage was a consequence of an act dangerous per se," if the facts charged are proved, he would be guilty of mayhem because the injury was "a consequence of an act dangerous per se": to drive an outboard motorboat at high

speed near the seashore where a group of people were enjoying a swim. Cf. People v. Astacio, 23 P.R.R. 783 (1916).

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico,

Plaintiff and petitioner

v.

David Castañón Pérez,

Defendant and respondent

No. 0-82-793
Certiorari

Separate vote of MR. JUSTICE IRIZARRY YUNQUE:

San Juan, Puerto Rico, June 30, 1983

I concur with and join my vote to the opinion of the Court because I find that its appreciation of the Law is correct and because of the fact that it is limited to recognizing that, in this case, the evidence brought, vis-à-viz a motion for peremptory acquittal under Rule 135 of the Rules of Criminal Procedure, is sufficient to establish a prima facie case against the defendant. The opinion does not pass on, nor could it pass on, aspects of credi-

bility or on the sufficiency of the evidence with regard to the constitutional requirement of establishing guilt beyond a reasonable doubt. This is up to the trier of facts.

The Penal Code in force is a well-harmonized system, which was adopted in 1974 to take the place of the obsolete Code of 1902, and to correct many of the latter's flaws. See the report on the Senate Bill No. 753 which became the act that adopted the present Penal Code. 33 L.P.R.A. § 3001 (annotation).

Under this legislative scheme it is impossible to conceive that the "gross or willful negligence" defined in art. 87 (33 L.P.R.A. § 4006) is equivalent to the malice required by the offense of mayhem as defined in art. 96 (33 L.P.R.A. § 4033). I shall explain further.

Article 87 provides:

When, in a death caused by a person while driving a motor vehicle, there is proof of gross or wilful negligence, he shall be punished by imprisonment for a fixed term of three (3) years. Should there be aggragavating circumstances, the fixed term established may be increased to a maximum of five (5) years; if there should be extenuating circumstances, it may be reduced to a minimum of two (2) years.

Gross or wilful negligence is that which by its nature shows absolute contempt for the safety of others under circumstances which will probably cause harm to the latter, and does not merely involve carelessness.

Article 96 reads:

Every person who unlawfully and maliciously deprives another of a member of his body, or mains, disfigures or renders him useless, or cuts or mutilates the tongue, or puts out an eye, or slits the nose, ear or lip, disfigures, or permanently changes the appearance of his face, or permanently impairs his capacity to hear, see or speak, shall be punished by imprisonment for a fixed term of nine (9) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of fifteen (15) years; if there should be extenuating circumstances it may be reduced to a minimum of six (6) years. The Court may impose the penalty of restitution in addition to the penalty of imprisonment established, or both penalties.

As a reading of these articles shows, causing a person's death when driving a motor vehicle with "gross or willful negligence," and "unlawfully and maliciously" depriving a person of a member of his body, are both felonies, but the Lawmaker deemed that the second offense was most serious than the first one because, whereas a three-year sentence is set for the former, the punishment for the latter is three times longer--nine years in prison. In abstract terms, nobody would think that, from the point of view of the Code, to deprive a person of a member of his body would be a more serious offense than to deprive a person of his life. The right to life is one of the fundamental rights of our Constitution. Bill of Rights, Art. II, Sec. 7.

The only explanation to justify the different punishments established for these offenses can be found in the way they are committed. Manslaughter, as defined in

art. 87, requires "gross or willful negligence." Mayhem requires that the defendant acts "unlawfully and maliciously." Obviously, "gross or willful negligence" and "malice" are not synonyms. Hence, a person who "unlawfully and maliciously" hurls a a motor vehicle against a group of persons and with his act, causes the death of said persons, commits the offense of murder as defined in art. 82 (33 L.P.R.A. § 4001).* If with his act he deprives one of the persons of a member of his body, he commits mayhem.**

The defendant in the case before our consideration, is charged with "illegally, voluntarily, maliciously, and criminally depriving the human being Abbot Kaufer

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*It reads: "Murder is the killing of of a human being with malice aforethought."

**The terms "malice or maliciously" are defined in art. 7 of the Code, 33 L.P.R.A. § 3022(19), as "denot(ing) the commission of a damaging, intentional act, without justification or excuse and the conscious nature thereof."

Medina of a member of his body, when, while said defendant was operating a motorboat in the Isla Verde beach, he impacted said young man with his motorboat and severed his left arm with the propeller." After the close of the evidence for the prosecution which tried to establish the allegations in the information, the defendant sought, and the court granted him, a peremptory acquittal under Rule 135 of the Rules of Criminal Procedure.

The cited Rule 135 provides that the court "on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses of the information or complaint at any time after the evidence of either side is closed if the court deems the evidence insufficient to warrant a conviction of such offense or offenses."

In the case before us, only evidence for the prosecution has been presented.

Its sufficiency should be determined in such a way that, if considered as a whole, bearing in mind the inferences it allows, and also considering it as is most favorable to the information, if it is true, it would duly establish all the essential elements of the offense charged. On this particular, see, Wright, Federal Practice and Procedure: Criminal 2d § 462 and § 467, where it cites abundant case law regarding Rule 29 of the Federal Rules of Criminal Procedure, which is similar to our Rule 135. The following comment on sec. 467 is relevant hereto:

> A number of familiar rules circumscribe the court in determining whether the evidence is sufficient to meet this test. It is not for the court to assess the credibility of witnesses, weight the evidence, or draw inferences of fact from the evidence. These are functions of the jury. The court must look to all of the evidence, but must take the view of the evidence and the inferences therefrom most favorable to the government. That the testimony is in conflict is not in itself enough to require judgment of acquittal. (Footnotes omitted.)

The evidence adduced herein is contained in the opinion of the Court, thus we need not copy it again. It points to the defendant as the pilot of the motorboat traveling at a high speed over shallow waters near the beach that was crowded with swimmers, and who, with the propeller of his motorboat, tore off an arm from one of the swimmers, after which he left the place at great speed.

The intent to commit a wrongful act, without justification or excuse and the conscious nature thereof, are subjective factors expressly required by the Penal Code to constitute the element of "malice or maliciously." Art. 7(19), ante. Since these are subjective factors, they must be inferred from the circumstances as a whole. In view of a motion for peremptory acquittal, as that proposed herein, these circumstances should have been considered as were most favorable to the information, and that

is why, in this case, said motion should not have been granted.

Notwithstanding the aforesaid, it bears noting that to pass on the sufficiency of evidence when examining a motion under Rule 135, is one thing, and to weigh the totality of the evidence after both parties have presented their cases, so that the Court may pass on the defendant's innocence or guilt, is quite another. In the second case, the approach is different. To find the defendant guilty, the evidence must satisfy the trier's mind beyond a reasonable doubt. We cannot pass upon that, because it is within the exclusive province of the trier of facts.

I agree that the case be remanded to the trial court for further proceedings.